

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REBECCA T. SHUMYE,  
Plaintiff,

No. C-06-3322 MMC

**ORDER DISMISSING ACTION**

v.

SAMUEL D. FELLEKE,  
Defendant

On August 19, 2008, plaintiff failed to appear at the Pretrial Conference, in violation of the Court's May 19, 2008 Pretrial Preparation Order. Earlier, on June 17, 2008, plaintiff failed to appear at her noticed deposition. Further, on July 24, 2008, plaintiff failed to appear at her subsequently re-scheduled deposition and to provide documents regarding her income for the years 2003, 2006, and 2007, in violation of Magistrate Judge Elizabeth D. Laporte's order of July 3, 2008.

Thereafter, on August 20, 2008, the Court ordered plaintiff to show cause, no later than August 29, 2008, why, in light of the above-referenced failures to comply with court orders and failures to appear at noticed proceedings, the instant action should not be dismissed with prejudice. Plaintiff failed to file a timely response to the Court's August 20,

2008 order.<sup>1</sup> Thereafter, on September 4, 2008, plaintiff filed a two-page document titled "Request of the Court to Make a Decision on Plaintiff's Opposition of the Order of August 20, 2008." In the second page of said document, plaintiff included her response to the Court's August 20, 2008 order and requested therein that the Court conduct a hearing to determine whether the matter should be dismissed. On September 8, 2008, defendant filed a reply to plaintiff's response, in which defendant requested that plaintiff's complaint be dismissed with prejudice as a sanction for plaintiff's failure to appear at her deposition and failure to comply with court orders. By order filed September 11, 2008, the Court scheduled a September 30, 2008 hearing on plaintiff's response to the order to show cause, which hearing was thereafter continued to October 6, 2008 by order filed September 16, 2008. On September 17, 2008, plaintiff filed a further response to the August 20, 2008 order to show cause.

On October 6, 2008, the Court conducted a hearing. Plaintiff, proceeding pro se, and defendant, through counsel Tesfaye W. Tsadik, appeared. Both plaintiff and defendant's counsel testified. Having considered the papers filed by the parties, the testimony of the parties and oral argument made on October 6, 2008, the Court rules as follows.

#### **A. Plaintiffs' Failures to Provide Discovery and to Comply With Court Orders**

As noted, plaintiff failed to appear at her noticed deposition, failed to appear at the subsequently re-noticed deposition, and failed to appear at the Pretrial Conference. For the reasons stated below, the Court finds, as to each of the above-referenced failures, plaintiff made a willful decision not to appear.

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<sup>1</sup>On August 25, 2008, plaintiff filed the following three documents: (1) "Plaintiff's Proposed Findings of Fact and Conclusion of Law," in which document plaintiff identifies issues pertinent to the merits of her claims; (2) "Plaintiff Rebecca Shumye Declaration," in which document plaintiff addresses the merits of her claims; and (3) "Opposition to Defendant Samuel D. Felleke's Motion in Limine to Exclude Plaintiff's Testimony or Introduction of Any Evidence That Her Income for Year of 2007 Was Below the Poverty Guide Line," in which plaintiff opposes a motion in limine that had been scheduled to be heard at the Pretrial Conference. None of these filings addresses the Court's order of August 20, 2008; rather, they are, in each instance, documents plaintiff should have filed before the Pretrial Conference.

1           **1. Failure to Appear at June 17, 2008 Deposition**

2           It is undisputed plaintiff received notice that her deposition would be taken on June  
3 17, 2008 at 10:00 a.m. in the office of defendant's counsel, that plaintiff appeared at  
4 approximately 9:15 a.m. on June 17, 2008, that plaintiff was informed by defendant's  
5 counsel the deposition would begin at 10:00 a.m., that plaintiff requested to use and was  
6 allowed to use the restroom in the office, and that plaintiff was invited to wait in the  
7 reception area of the office until 10:00 a.m. What occurred thereafter is in dispute.

8           At the October 6, 2008 hearing, plaintiff testified that she decided to wait in her car  
9 rather than the office and that, as she waited in her car, she received, before 10:00 a.m., a  
10 telephone call from defendant's counsel, who told plaintiff he had spoken to defendant and  
11 they had decided there was no need for a deposition and had cancelled the deposition.  
12 Plaintiff testified she then left. Plaintiff denied receiving any other message from  
13 defendant's counsel or from anyone else in counsel's office. Plaintiff further stated that, a  
14 few days later, she called defendant's counsel, who told plaintiff he had changed his mind  
15 and now wanted to proceed with a deposition.

16           According to defendant's counsel, he invited plaintiff to wait in the reception area  
17 and he returned to his office to work. Counsel also testified that when plaintiff did not  
18 return at 10:00 a.m., he instructed an attorney in his office to telephone plaintiff and leave a  
19 message reminding her of the deposition. Because the court reporter who had been  
20 scheduled for the deposition had appeared at 10:00 a.m., counsel was required to, and did,  
21 pay for the reporter's services. Counsel further testified that the following day he left  
22 plaintiff a message advising her that he would have to file a motion to compel if plaintiff  
23 would not appear at a deposition; plaintiff never replied, thereby necessitating the  
24 subsequent filing of a motion to compel.

25           The Court finds the testimony offered by defendant's counsel is credible, whereas  
26 plaintiff's testimony is not.

27           First, the testimony plaintiff offered at the October 6, 2008 hearing is inconsistent  
28 with an earlier statement by plaintiff, made under penalty of perjury, which plaintiff had

1 offered to explain her failure to appear at the June 17, 2008 deposition. Specifically,  
2 plaintiff declared in said filing that when she arrived at defendant's counsel office on June  
3 17, 2008, counsel told plaintiff that "he [had] talked with Defendant and cancelled the  
4 deposition on June 17, 2008 right before [plaintiff's] appearance in his office." (See  
5 Shumye Decl., filed July 3, 2008, at ¶¶ 2-4 (emphasis added).) As set forth above, plaintiff,  
6 at the October 6, 2008 hearing, testified that when she appeared at defendant's counsel's  
7 office, she was advised by counsel the deposition would begin at 10:00 a.m., and she was  
8 invited to wait in the reception area until such time, after using the restroom in the office.  
9 Under this latter version, defendant's counsel assertedly did not speak to defendant, and  
10 did not reach a decision to cancel the deposition, until a considerable amount of time had  
11 passed after plaintiff's appearance in the office.

12 Moreover, even if the differences in plaintiff's versions could be reconciled, the  
13 Court's acceptance of either such version is dependent on a finding that defendant's  
14 counsel made a sequence of illogical decisions under the circumstances then pertaining.  
15 Specifically, counsel was aware that at the trial of the case, plaintiff would be presenting  
16 her claim that defendant owed plaintiff, inter alia, financial support for the year 2007, under  
17 the theory that plaintiff's income for the year 2007 was allegedly less than 125 percent of  
18 the federal poverty line. The only procedure by which defendant had any realistic chance  
19 of learning the factual basis of plaintiff's claim for the year 2007 was to take plaintiff's  
20 deposition and to obtain from plaintiff at such time both her testimony in that regard and  
21 any documents in her possession relevant thereto.<sup>2</sup> The discovery cut-off at that time was  
22 June 27, 2008. Under such circumstances, it is not plausible that counsel would first  
23 schedule such deposition and then, once plaintiff appeared, decide to forego the  
24 opportunity, incur the costs associated with the reporter's attendance, and then seek the  
25 court's assistance in requiring plaintiff to appear on a later date.

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27 <sup>2</sup>Indeed, counsel had taken plaintiff's deposition with respect to any claims based on  
28 the years 2000 through 2006. That deposition was taken in January 2007. Needless to  
say, defendant had no opportunity at that earlier time to learn the basis for plaintiff's claim  
to the extent it is based on non-payment in the year 2007, which had just begun.

1 Accordingly, the Court finds plaintiff made a unilateral decision not be deposed on  
2 June 17, 2008.

3 **2. Failure to Appear at July 24, 2008 Deposition**

4 On July 1, 2008, Magistrate Judge Laporte conducted a hearing on defendant's  
5 motion to compel plaintiff to appear for deposition and to provide documents in connection  
6 therewith; by order filed July 3, 2008, the motion was granted. Specifically, Magistrate  
7 Judge Laporte ordered plaintiff to appear for her deposition on July 24, 2008 at 10:00 a.m.  
8 in defendant's counsel's office and at such time to provide documents regarding plaintiff's  
9 income for the years 2003, 2006, and 2007, as well as her tax returns for said years.

10 It is undisputed that plaintiff did not attend the July 24, 2008 deposition. At the  
11 October 6, 2008 hearing, plaintiff admitted that she had received actual notice of Magistrate  
12 Judge Laporte's order and that she decided not to attend. According to plaintiff, she did not  
13 attend the court-ordered deposition for two reasons.

14 First, plaintiff testified that defendant's counsel had advised her on June 17, 2008  
15 that he did not wish to depose her, and, consequently, plaintiff was of the view she could  
16 ignore Magistrate Judge Laporte's order. As stated above, however, the Court finds  
17 defendant's counsel did not so advise plaintiff, and, in any event, such explanation is not an  
18 adequate excuse for a failure to comply with a court order.

19 Second, plaintiff testified she had not received notice of the motion to compel until  
20 after Judge Laporte had conducted the hearing thereon, which, according to plaintiff,  
21 constitutes an additional justification for her decision not to attend the deposition ordered at  
22 such hearing. The docket indicates, however, that plaintiff received notice of the motion by  
23 e-mail on June 20, 2008, (see Docket # 177-79), and that on June 24, 2008, she received,  
24 by email, notice of Judge Laporte's June 24, 2008 order scheduling the date and time of  
25 the hearing, (see Docket # 181). Plaintiff admitted at the October 6, 2008 hearing that the  
26 e-mail account to which such notices were sent is one of two active email accounts she  
27 maintains. Further, the motion was mailed to plaintiff's address of record, specifically, P.O.  
28 Box 10832, Oakland, California, 94610, on June 20, 2008, and the order scheduling the

1 hearing thereon was mailed to the same address on June 24, 2008. At the October 6,  
2 2008 hearing, plaintiff testified that she usually checks that post office box every day, or, at  
3 a minimum, every second or third day; plaintiff did not testify that she deviated from her  
4 usual practice during the time period encompassing either the mailing of defendant's  
5 motion or the mailing of the Court's order scheduling the hearing thereon.

6 Under such circumstances, the Court finds plaintiff's testimony denying she received  
7 said documents until after the July 3, 2008 hearing is not credible. Moreover, even if  
8 plaintiff had an excuse for her failure to check both her email and her post office box, as  
9 well as her failure to check the Court's docket – and none has been offered or even  
10 implied – plaintiff, upon receiving the order granting the motion to compel, took no steps to  
11 seek reconsideration of Magistrate Judge Laporte's order and, instead, chose to ignore it.

### 12 **3. Failure to Appear at August 19 Pretrial Conference**

13 At the May 16, 2008 Case Management Conference, the Court scheduled, and  
14 plaintiff was directed to appear at, a Pretrial Conference to be held on August 19, 2008.  
15 Thereafter, as noted, plaintiff was ordered, by written order filed May 19, 2008, to appear at  
16 the August 19, 2008 Pretrial Conference. Subsequently, by order filed July 11, 2008,  
17 plaintiff was reminded of her obligation to attend the August 19, 2008 Pretrial Conference.  
18 Nonetheless, plaintiff failed to appear on August 19, 2008.

19 In her first written response to the Court's order to show cause, plaintiff declared  
20 under penalty of perjury that "after she left for Hayward, her car was broken," that she  
21 "[had] no money left to either fix it or come to the Court," and that she also "was left with no  
22 money to even call the Court." (See Pl.'s Req., filed September 4, 2008, at 2.) In her  
23 second written response to the Court's order to show cause, plaintiff declared under  
24 penalty of perjury: "It is true that my car was broken in Hayward because of lack of money  
25 and delay of my student loan disbursement. I couldn't be able to show up in court or call  
26 the court on that particular court date for the same reason." (See Pl.'s Decl., filed  
27 September 17, 2008, ¶ 3.)

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1 At the October 6, 2008 hearing, plaintiff testified that she has been living in her car  
2 for the past year, and that she normally sleeps in her car, which she parks across the  
3 street from a police station in the city of Emeryville. Plaintiff further testified that one  
4 evening, on an unspecified date before August 19, 2008, she was sleeping in her car, and,  
5 although she had placed her cash and her cell phone underneath her, someone broke into  
6 her car and took her cash and cell phone without her knowledge. According to plaintiff,  
7 after said incident, but still prior to August 19, 2008, while she was driving from Emeryville  
8 to Hayward, where she attends classes at California State University ("Cal State"), her car  
9 ran out of gas; she lacked funds to purchase gas and, consequently, she took a free shuttle  
10 to Cal State, whereupon she applied for an emergency loan, but did not receive those  
11 funds until two or three days after August 19. Because, plaintiff asserted, she had not  
12 received her emergency loan funds by August 19, the date of the Pretrial Conference,  
13 plaintiff was unable to travel to San Francisco to attend such proceeding nor could she  
14 contact the court to indicate she was unable to attend. Plaintiff further testified that, on  
15 another unspecified date, she was notified by an employee of the Ninth Circuit Court of  
16 Appeals that her cell phone had been found at the Ninth Circuit courthouse in San  
17 Francisco, and, on a date after August 19, that she traveled to San Francisco and retrieved  
18 her phone. Although plaintiff testified she had on at least one prior occasion gone to the  
19 Ninth Circuit courthouse in order to file documents, she denied leaving her cell phone at  
20 such location; rather, according to plaintiff, the individual who stole her cell phone must  
21 have left it there.

22 The Court finds much of plaintiff's account lacks credibility. Aside from the  
23 improbability of some unknown person's managing to break into plaintiff's vehicle and,  
24 unbeknownst to plaintiff, reach under her to take her funds and cell phone, and then take  
25 that phone to the Ninth Circuit Court of Appeals, plaintiff has offered inconsistent testimony  
26 as to the condition of her car on August 19, 2008. In both of her written submissions in  
27 response to the Court's order to show cause, plaintiff stated under penalty of perjury that  
28 en route from Emeryville to Cal State her car became "broken," thus suggesting an



1 unforeseeable mechanical defect; at the October 6, 2008 hearing, however, plaintiff  
2 testified she had run out of gas.<sup>3</sup>

3        Additionally, plaintiff's assertion that she was unable to contact the Court on August  
4 19, 2008 due to a lack of funds is contradicted by other evidence in the record.  
5 Specifically, even if the Court were to accept plaintiff's testimony that she literally lacked the  
6 funds necessary to make use of a pay phone, the record reflects that plaintiff had the use  
7 of at least one of her email accounts during the morning of August 19, 2008, as shown by  
8 plaintiff's having sent an email to a Cal State employee at 9:54 a.m. on that date, (see Pl.'s  
9 Resp., filed September 17, 2008, Ex. A), and that plaintiff knew how to contact the district  
10 court by email, (see, e.g., Letter, filed April 11, 2008, attachments thereto); at a minimum,  
11 plaintiff could have notified defendant's counsel, with whom, according to her testimony,  
12 she has had occasion to communicate by email.

13        Accordingly, the Court finds plaintiff, for whatever personal reasons, chose not to  
14 attend the Pretrial Conference and chose not to notify the Court or defendant's counsel of  
15 such decision.

#### 16        **4. Willfulness**

17        Plaintiff's testimony and filings offered in connection with the October 6, 2008  
18 hearing are indicative of a pattern, whereby plaintiff has attempted to pursue her claims  
19 under her own rules and on her own schedule, rather than in accordance with the Court's  
20 rulings and schedule. In that regard, plaintiff (1) failed to appear at her properly-noticed  
21 June 17, 2008 deposition, or, more specifically, left shortly before the deposition was  
22 scheduled to begin, thereby forcing defendant to unnecessarily incur fees and costs,  
23 (2) failed to comply with Magistrate Judge Laporte's order that plaintiff appear for a  
24 deposition on July 24, 2008, thereby again forcing defendant to incur unnecessary fees and  
25 costs, (3) failed to comply with Magistrate Judge Laporte's order that plaintiff produce  
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27        <sup>3</sup>Plaintiff never succeeded in explaining why, given her asserted shortage of funds,  
28 she chose to commute regularly from Emeryville to Cal State, a round-trip distance of  
approximately 40 miles.



1 certain specified discovery on July 24, 2008, and has failed to provide such discovery at  
2 any later time, (4) failed to appear at the August 19, 2008 Pretrial Conference, thus, yet  
3 again, forcing defendant to incur fees and costs to no productive end, (5) failed to file any  
4 proposed findings of fact and conclusions of law and any response to defendant's motion in  
5 limine before the scheduled Pretrial Conference, and, instead, without explanation, waited  
6 until several days after the scheduled Pretrial Conference to file such documents, and (6)  
7 failed to file a timely response to the Court's August 20, 2008 Order to Show Cause, and  
8 instead submitted an untimely filing, which, although submitted on a date not substantially  
9 past the deadline, was, again, offered without any explanation for plaintiff's dilatory  
10 behavior.<sup>4</sup>

11 Court orders setting a deadline or requiring a party's appearance "permit the court  
12 and the parties to deal with cases in a thorough and orderly manner." See Wong v.  
13 Regents, 410 F. 3d 1052, 1062 (9th Cir. 2005). Plaintiff, however, has routinely treated the  
14 Court's orders as, at best, suggestions. At times, plaintiff has complied with an order on a  
15 timely basis, while, on other occasions, plaintiff had complied on an untimely basis or  
16 ignored the order entirely.<sup>5</sup>

17 Court orders are not "frivolous piece[s] of paper, idly entered, which can be  
18 cavalierly disregarded by [a party] without peril." See Johnson v. Mammoth Recreations,  
19 Inc., 975 F. 2d 604, 610 (9th Cir. 1992) (internal quotation and citation omitted). A party's  
20 disregard of court orders "undermine[s] the court's ability to control its docket, disrupt[s] the  
21 agreed-upon course of the litigation, and reward[s] the indolent and the cavalier." See id.

22 Here, in light of plaintiff's having failed to offer sufficient justification or credible  
23 explanation for her multiple failures to provide discovery, to comply with court orders and to  
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25 <sup>4</sup>Over the course of the instant action, plaintiff has filed a number of timely-submitted  
26 documents, thus demonstrating she is familiar with the procedure for, and capable of, filing  
documents, at least when she finds it to be in her interest to do so.

27 <sup>5</sup>Consistent with her pattern of pursuing her claims under her own rules and on her  
28 own schedule, plaintiff has stated she will decline to offer any testimony at trial because  
she does not believe defendant should have the right to question her at trial.

1 attend court-ordered proceedings, and no justification appearing from the record, the Court  
 2 finds plaintiff's failure to attend the June 17, 2008 deposition, failure to attend the July 24,  
 3 2008 court-ordered deposition, failure to provide documents at the July 24, 2008  
 4 deposition, and failure to attend the August 19, 2008 Pretrial Conference were, in each  
 5 instance, willful in nature.

#### 6 **B. Dismissal as a Sanction**

7 Under Rule 37 of the Federal Rules of Civil Procedure, a court may dismiss an  
 8 action as a sanction for a party's failure to attend a noticed deposition, see Fed. R. Civ. P.  
 9 37(d), and/or for a failure to obey a court order to provide discovery, see Fed. R. Civ. P.  
 10 37(b). Additionally, under Rule 41, a court may dismiss an action as a sanction for a failure  
 11 to obey a court order of any kind. See Fed. R. Civ. P. 41(b).

12 In determining whether dismissal for failure to provide discovery and/or for failure to  
 13 obey court orders is appropriate, a district court "must weigh the following five factors:  
 14 (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage  
 15 its dockets; (3) the risk of prejudice to the defendants; (4) the public policy favoring  
 16 disposition of cases on their merits; and (5) the availability of less drastic sanctions." See  
 17 Henry v. Gill Industries, Inc., 983 F. 2d 943, 948 (9th Cir. 1993) (analyzing factors under  
 18 Rule 37); see also Ferdiz v. Bonzelet, 963 F. 2d 1258, 1260-61 (9th Cir. 1992) (analyzing  
 19 factors under Rule 41(b)). Where, as here, a party has willfully failed to appear at a  
 20 properly-noticed deposition and has willfully violated court orders, the first two factors  
 21 support imposition of the sanction of dismissal, while the fourth factor weighs against such  
 22 dismissal. See Adriana Int'l Corp. v. Thoeren, 913 F. 2d 1406, 1412 (9<sup>th</sup> Cir. 1990), cert.  
 23 denied, 498 U.S. 1109 (1991). "Therefore, it is the third [prejudice] and fifth [alternative  
 24 sanctions] factors that are decisive." Id.

25 "A defendant suffers prejudice if the plaintiff's actions impair the defendant's ability to  
 26 go to trial or threaten to interfere with the rightful decision of the case." Id. (holding  
 27 plaintiff's failure to comply with order to appear at deposition and to produce documents  
 28 "constitute[d] an interference with the rightful decision of the case," thus establishing

1 prejudice to defendants and supporting district court's dismissal of complaint as sanction).  
2 Here, plaintiff's remaining claims are that defendant failed to comply with a contractual  
3 obligation to provide plaintiff with financial support necessary to maintain plaintiff at an  
4 income of at least 125 percent of the federal poverty guidelines, for the years 2003, 2006,  
5 and 2007. Because, for any such year, defendant had no obligation to provide support if  
6 plaintiff's income was at least 125 percent of the federal poverty guidelines, defendant, in  
7 order to prepare for trial, is entitled to obtain discovery as the factual basis for plaintiff's  
8 allegation that her income for each of the three years at issue herein fell below the  
9 contractual threshold. By refusing to attend a court-ordered deposition, plaintiff has  
10 deprived defendant of the opportunity to question plaintiff as to the basis of her assertion  
11 that her income in 2007 was below the contractual threshold,<sup>6</sup> and, further, by refusing to  
12 comply with the court's order requiring her to make available for inspection the documents  
13 relevant to plaintiff's income for each of the three years at issue, plaintiff has deprived  
14 defendant of the opportunity to prepare his defense to any of plaintiff's claims.

15 Plaintiff thereafter compounded the injury by failing to appear at the Pretrial  
16 Conference, thus depriving defendant of an opportunity to obtain a ruling on a properly-  
17 filed motion in limine and to obtain at least some notice of the type of evidence plaintiff  
18 intended to offer at trial. Moreover, the trial date was necessarily vacated in light of  
19 plaintiff's failure to appear at the Pretrial Conference. The instant action was filed on May  
20 19, 2006 and had been scheduled to begin trial on August 25, 2008. As a result of  
21 plaintiff's unexcused conduct, the case, filed almost two and half years ago, remains  
22 unresolved and, essentially, hanging over defendant's head. Further, it is difficult to  
23 reschedule trials, given the need to adjust the Court's calendar and to accommodate the  
24 schedules of the parties and witnesses. Finally, the rescheduling of a trial necessarily  
25 entails additional expenditures of counsel's time, with the resultant additional costs to the  
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27 <sup>6</sup>As noted, plaintiff did appear at any earlier deposition, at which time defendant had  
28 the opportunity to examine plaintiff as to her assertions with respect to the years 2003 and 2006.

1 represented party.

2 Accordingly, the Court finds plaintiff's failure to provide discovery, failure to comply  
3 with court orders and failures to attend proceedings not only has created a risk of prejudice  
4 to defendant, but has, in fact, prejudiced defendant.

5 The Court next turns to the question of whether sanctions less severe than dismissal  
6 are appropriate. Some of the other possible sanctions, specifically, establishing facts in  
7 favor of the defendant, prohibiting plaintiff from supporting some of her claims by precluding  
8 her from offering designated evidence, or striking from the complaint some of plaintiff's  
9 claims, see Fed. R. Civ. P. 37(b)(2)(A)(i), (ii), (iii), would not provide a meaningful remedy  
10 herein. As noted, plaintiff's failure to attend court-ordered proceedings and refusal to  
11 provide discovery has significantly impaired defendant's ability to prepare a defense to  
12 plaintiff's case in its entirety. Another possible alternative sanction, staying the action until  
13 such time as plaintiff complies with the orders she has willfully disobeyed, see Fed. R. Civ.  
14 P. 37(b)(2)(A)(iv), is unlikely to have a salutary effect, given plaintiff's failure to show any  
15 inclination to comply with the court orders she has violated and/or to comply with orders as  
16 to which she disagrees. Additionally, such a stay would significantly interfere with the  
17 Court's ability to effectively manage its docket, and would place defendant at the mercy of  
18 plaintiff's dictated schedule. Moreover, given plaintiff's asserted lack of funds, imposition of  
19 monetary sanctions, see Fed. R. Civ. P. 37(b)(2)(C), is highly unlikely to result either in  
20 assuring plaintiff's compliance with future court orders or in compensating defendant for the  
21 expenses he has incurred by reason of plaintiff's noncompliance to date. Further, to the  
22 extent the Court, at the time of the Pretrial Conference, might have endeavored to fashion  
23 some alternative sanction, plaintiff precluded the Court from doing so, in light of plaintiff's  
24 failure to attend the Pretrial Conference.<sup>7</sup> Given all of the above considerations, the Court

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26 <sup>7</sup>For example, if defendant's counsel had been available to depose plaintiff during  
27 any of the days remaining between the Pretrial Conference and the first day of trial, it is  
28 possible plaintiff, once again, could have been ordered to appear for her deposition and to  
provide the required discovery either in time for defendant to adequately prepare for trial as  
scheduled or for trial on a date relatively soon thereafter.

1 finds no reasonable alternative sanctions are available.

2 Finally, the Court notes that although plaintiff is proceeding pro se, a pro se litigant  
3 who "chooses [herself] as legal representative should be treated no differently" than a party  
4 who is represented by an attorney. See Jacobsen v. Filler, 790 F. 2d 1362, 1364-65 (9th  
5 Cir. 1986).<sup>8</sup>

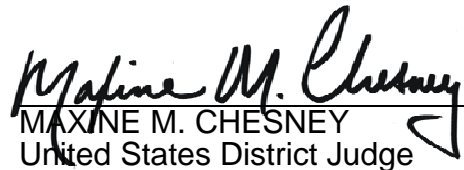
6 In sum, the Court finds that dismissal is the appropriate sanction for plaintiff's  
7 failures to appear and violation of court orders.

8 **CONCLUSION**

9 For the reasons stated above, the instant action is hereby DISMISSED with  
10 prejudice, pursuant to Rules 37(b) and 41(b) of the Federal Rules of Civil Procedure.

11 **IT IS SO ORDERED.**

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13 Dated: October 21, 2008

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MAXINE M. CHESNEY  
United States District Judge

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<sup>8</sup>Although the Court located pro bono counsel to represent plaintiff, and such  
28 counsel was appointed as plaintiff's counsel of record, plaintiff subsequently decided to  
discharge said attorney and to proceed pro se.